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No. 936

In the Supreme Court of the United States

OCTOBER TERM, 1962

YALE TRANSPORT CORP., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, which sustained an order of the Interstate Commerce Commission denying appellant's application for a certificate of public convenience and necessity as a common carrier by motor vehicle.

Appellant, a certificated motor carrier, is successor in interest to B. & E. Transportation Company, Inc.,

a "grandfather" applicant authorized, insofar as is pertinent, to operate over two regular, designated routes between New York and Boston, serving among other intermediate points New Haven and Hartford, Connecticut, and Providence, Rhode Island. *B. & E. Transp. Co., Inc., Common Carrier Application,* 12 M.C.C. 531, 540 (1939). By subsequent purchase, the carrier acquired the right to conduct operations, over irregular routes, between New Haven, on the one hand, and points in Massachusetts, on the other. *B. & E. Transportation Co., Inc.—Purchase—New Haven Trucking Company, Inc.,* Docket No. MC–F–1039 (unreported 1940). Another purchase several years later gave the carrier the authority to operate, over irregular routes, from New York, New Rochelle, and points in Westchester County, New York, within 15 miles of New Rochelle to points in Connecticut, and from points in Connecticut on and west of U.S. Highway 5 to New York, New Rochelle, and points in Westchester County within 15 miles of New Rochelle. *Isidor Eisen—Control; B. & E. Transportation Co., Inc.—Purchase—Werden Barringham,* Docket No. MC–F–3866 (unreported 1948).

By joinder or tacking of these operating authorities at points that are common to them (*i.e.,* are gateways), the appellant may handle a shipment from a point authorized to be served by one grant to a point authorized to be served by another. However, as the Commission noted in approving the Barringham purchase, "In conducting operations under the unified regular- and irregular-route rights, vendee will be required to move shipments through points common to

both operating rights as gateways, and to preserve the distinction between regular and irregular route operating rights." For example, the appellant is authorized to handle freight from Taunton, Massachusetts, to Hartford, Connecticut, but only by operating via the gateway point for the two authorities, New Haven. Similarly, the appellant is authorized to transport shipments from Winsted, Connecticut, to Providence, but, again, only by operating via the gateway points for the two authorities, New York, Rochelle, and points in Westchester County within 15 miles of New Rochelle.

On October 12, 1960, appellant applied for a certificate which, among other things, would have authorized operations directly to and from the points in the irregular-route areas, without observance of the gateway points of New Haven, New York, New Rochelle, and points in Westchester County within 15 miles of New Rochelle (J.S. 6, 21, 23). The appellant offered no evidence of a need for a new transportation service (J.S. 17, 25). Rather, appellant rested its case upon a purported showing that it already was an effective competitor, transporting a substantial volume of freight between the involved points, and that the certificate should be granted as a means of achieving efficiencies and economies in the performance of a transportation service already being rendered (J.S. 17, 24–25). The examiner recommended that appellant's application be denied (J.S. 35):

> Elimination of the gateways in question would enable applicant to decrease its operating time

> between most of the points under consideration to such an extent that it would no longer correspond to the operation presently conducted by applicant, thereby increasing its competitive situation to the detriment of existing carriers whose service has not been shown inadequate in any respect. The examiner concludes that the proposed service would be tantamount to a new service, and since no need has been shown for any new service, the application should be denied.

The Commission found the appellant's exceptions unmeritorous and adopted in its entirety the report and recommended order of the examiner (J.S. 20). The three-judge district court unanimously affirmed the Commission's order on the ground that it was supported by adequate findings and evidence (J.S. 18).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The determination of whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535–536; *United States* v. *Detroit Navigation Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Since, as the district court found, the Commission's conclusion was based upon adequate findings supported by probative evidence, there appears to be no occasion for plenary consideration of the case by this Court.

1. Appellate claims, as grounds for review (J.S. 7–8), that the hearing examiner "misread" and misapplied the Commission's decision in *Childress—Elimination of Sanford Gateway,* 61 M.C.C. 421 (1952), and that "[t]he error of the Court below" was its failure to review this "egregious departure from all previous standards." However, the examiner did not fail to follow the *Childress* or any other previous Commission decisions.

Appellant argues (J.S. 4–5, 8) that under *Childress* the Commission must grant an application for elimination of gateways solely upon proof of operating economies, without considering whether the elimination of the gateways would result in the creation of a new service. In *Childress,* the Commission did hold that the granting of an application to eliminate a gateway would be "justified solely upon proof that the proposed operation would result in operating economies" provided the applicant was already "transporting a substantial volume of traffic * * * through the gateway" point so as to "effectively and efficiently competing with the existing carriers." 61 M.C.C. at 428. The Commission, however, went on to say that, where "elimination of the gateway requirement would enable applicant to institute a new service," "it is incumbent upon [the] applicant to prove public convenience and necessity the same as in any other application for new authority." *Ibid.* Similarly, in *Interstate Common Carrier Council* v. *United States,* 84 F. Supp. 414, 420–421 (D. Md.), affirmed *per curiam,* 338 U.S. 843, the district court held that "the Commission has full authority to grant

an alternate route upon a showing merely of economies in operation" without requiring proof as to public convenience and necessity "where the alternative route granted is a truly alternate route and not a new service," but "such evidence [economies in operation] alone is insufficient for an order granting a newly authorized route." See also *Herrin Transp. Co.* v. *United States*, 15 Fed. Carr. Cas. 81,464 (S.D. Tex.) (1962); *Michigan Motor Freight Lines* v. *United States*, 113 F. Supp. 812 (E.D. Mich.); *Clarke* v. *United States*, 101 F. Supp. 587 (D. D.C.).[1]

This view of the Commission and the courts is squarely based on the Interstate Commerce Act itself. Section 207 of the Act (49 U.S.C. 307) provides that the Commission may grant an application for a motor-carrier certificate only if the service is "required by the present or future public convenience and necessity." In situations where no new service is sought, it is consistent with the Act to allow the elimination of gateways upon proof of operating economies. But, where the elimination of gateways results in new service, there is no reason why the ordinary requirements of the Act—that the applicant show that the new service will serve the public convenience and necessity in all respects—should not apply. Thus, it is plain that

[1] Contrary to appellant's contention (J.S. 3), there is no conflict between the decision below and the *Interstate Common Carrier Council*, *Michigan Motor Freight*, and *Clarke* cases. These three cases all recognize, as did the court below, that an application for an amended certificate cannot be granted solely on proof of operating economies, if the proposed service is so different from the old as to constitute a new service. For these reasons they refused to allow amendment of the certificate.

proof of operating economies is not sufficient to justify a certificate of public convenience and necessity if the applicant is seeking to provide a new service.

The examiner, and the Commission in adopting his report, explicitly applied the standards laid down in *Childress* (J.S. 33–34). They found that appellant was "not effectively competing for this traffic" (J.S. 34) and that the elimination of the gateways would so increase appellant's competitive position as to be "tantamount to a new service" (J.S. 35). These were the same standards for ascertaining whether the applicant sought to provide new service which were adopted by the district court in *Emery Transportation Co.* v. *United States,* 12 Fed. Carr. Cas. 81,098 (N.D. Ill.) (1956).[2]

2. There is no merit in appellant's attack on the substantiality of the evidence supporting the Commission's finding that appellant was "not effectively competing" with existing carriers on the gateways routes (J.S. 34) and that elimination of the gateways would create "a new service" (J.S. 35). The evidence

[2] We have shown that the Commission followed the *Childress* decision. However, as the district court held (J.S. 17), it is not necessary to determine whether this decision is consistent with *Childress* as long as the Commission's standard is within its broad power of interpretation under the Act. This Court has held that, in the absence of arbitrariness, it is not the province of the courts "to inquire into the * * * consistency of [the Commission's] conclusion with those reached in similar cases." *Georgia Commission* v. *United States*, 283 U.S. 765, 775. See also *Virginian Ry.* v. *United States*, 272 U.S. 658, 663, 665–666; *ABC Freight Forwarding Corp.* v. *United States*, 169 F. Supp. 403, 405 (S.D. N.Y.).

introduced by appellant at the hearing showed that appellant's existing routes via gateways were circuitous and that a relatively small amount of traffic was handled in this manner (Exhibits 12–17). There was also evidence that elimination of the gateways would result in mileage savings as high as 74 percent (J.S. 24), from which the Commission concluded that elimination of the gateways would so materially alter the competitive relationship between appellant and the existing carriers as to create a new service (J.S. 35).* That the evidence upon which the Commission's findings were based did not include a showing by the protesting motor carriers of the volume of traffic handled by them (J.S. 10) and of the effect upon them of the grant of the appellant's application (J.S. 13) in no way obscured the fact that the appellant's proposed operations would be tantamount to a new service by it. The court below carefully reviewed the Commission's order and held that it was supported by probative evidence.

3. Although a result of the denial of appellant's application may be continued "uneconomic operations" through circuitous gateways (J.S. 9), such operations are of appellant's own making. The Com-

* In other alternate route and gateway removal cases, the Commission has found the following mileage savings to constitute a new service: 60 percent—*Chicago Express, Inc., Ext.—Tuscola, Ill.*, 79 M.C.C. 384, 386 (1959); 38 and 42 percent—*West Bros., Inc., Ext.—Alternate Routes*, 77 M.C.C. 699, 702 (1958); 49 percent—*C & H Transp. Co., Inc., Ext.—Kansas*, 71 M.C.C. 607, 609 (1957); 17 and 18 percent—*Atlantic Coast Freight Lines, Inc., Ext.—Alternate Route*, 71 M.C.C. 498, 501 (1957); 10 to 20 percent—*C & H Transp. Co., Inc., Ext.—Elimination of Texas Gateway*, 71 M.C.C. 483, 485, 486 (1957).

mission certified two separate and distinct operations, which appellant voluntarily tacked together by operating through the gateways. The appellant cannot now capitalize on the inefficiencies of operations voluntarily undertaken by it to obtain a certificate to perform a new service for which no public need has been shown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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